[2021] JMCA Civ 27

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS EDWARDS JA

SUPREME COURT CIVIL APPEAL NO 81/2017

BETWEEN	**BANK OF NOVA SCOTIA JAMAICA LTD**	**APPELLANT**
AND	**SOVEREIGN RESOURCES UK LIMITED**	**1ST RESPONDENT**
AND	**DEAN WILLIAMS**	**2ND RESPONDENT**

Courtney Williams and Jonathon Morgan instructed by DunnCox attorneys-at-law for the appellant

Keith Bishop and Andrew Graham instructed by Bishop & Partners attorneys-at-law for the respondents

26 June 2019 and 21 May 2021

PHILLIPS JA

[1] I have read my learned sister's draft reasons for judgment and I agree with her reasoning and conclusion. There is nothing that I can usefully add. We apologize for the delay in the delivery of this judgment which is deeply regretted.

SINCLAIR-HAYNES JA

[2] The Bank of Nova Scotia Jamaica Limited ('the Bank') has appealed Laing J's dismissal of its claim for the sum of $10,723,908.37, which it alleges is owed to them by the 1st respondent, Sovereign Resources UK Limited, which will be referred to as "SRUK" for convenience, and the 2nd respondent, Dean Williams. The claim is

consequent on the alleged non-payment of three demand loans and a credit card facility which were extended to the respondents.

[3] It is unchallenged that SRUK obtained the demand loans and credit card facility from the Bank, which were guaranteed by Mr Williams. The source of contention is whether there is any debt owed to the Bank and if so, the quantum of that debt.

Background

[4] The first loan agreement (#8000021) between the parties was entered into on 14 July 2011, for the sum of $8,000,000.00 with interest fixed at a rate of 14.75% per annum for the first 12 months and thereafter at the base lending rate plus 2%. The following day, 15 July 2011, a second loan agreement (#8000022) was entered into for the sum of $5,000,000.00 with interest calculated on a daily basis at a fixed rate of 8.95% per annum. On that day, 15 July 2011, Mr Williams signed an instrument of guarantee which guaranteed "all debts, liabilities, present and future, direct or indirect, absolute or contingent, matured or not, at any time owing…or remaining unpaid" by SRUK to the Bank.

[5] Both loans were secured by promissory notes signed by SRUK and were payable monthly. The Bank was also given a mortgage over a parcel of land owned by SRUK as collateral for its debt.

[6] On SRUK's further application to the Bank, on 18 July 2011, it was issued an "Executive Business Credit Card". In respect of the credit card, the parties agreed that the interest rates, annual fee, service charges, insurance premiums and other charges were to be in accordance with the Bank's "Rate and Fees Schedule".

[7] By 9 April 2012, SRUK's overdraft facility was transferred to a new demand loan #8000047 in the sum of $1,722,599.37, which the Bank averred was to prevent the facility from attracting the higher overdraft interest.

[8] It was the Bank's claim that SRUK breached its loan agreements and promissory notes by defaulting on its repayment of the three demand loans and the credit card

facility. In breach of the instrument of guarantee, Mr Williams also failed to repay the Bank for all or any of the debts incurred by SRUK.

[9] Consequently, on 18 February 2013, the Bank issued demand letters to SRUK, which were addressed to Mr Williams, in respect of the aforementioned facilities for the total sum of $16,941,228.00 with interest thereon and costs. The Bank, however, contends that notwithstanding those letters, the respondents have failed, neglected and/or refused to pay the sum claimed.

The proceedings in the court below

[10] On 14 May 2013, the Bank instituted proceedings against SRUK for the total sum of $17,599,528.34 plus interest and costs. In an effort to discharge SRUK's total debt, the Bank, on a date not disclosed, sold the parcel of land held as collateral, and applied the proceeds in partial satisfaction of SRUK's debt.

[11] The sale proceeds reduced the total debt to $10,723,908.37. In respect of the three demand loans, the sums claimed were reduced to $6,610,519.94 for demand loan #8000021, $2,165,168.98 for demand loan #8000022, and $1,553,889.34 for demand loan #8000047. There was no evidence that any of the sale proceeds was applied to the credit card debt.

[12] The Bank averred, in its particulars of claim, that not only was Mr Williams the guarantor for SRUK's loans, he was also the principal cardholder for the credit card facility. It was also averred that it was a term of the credit card agreement that any debt owing, including interest and other charges thereon were to be paid in full by the respondents.

[13] The pleadings outlined the principal and interest rate of each demand loan, as enumerated above. The respondents, it averred, defaulted in repaying the debt on the agreements and the instrument of guarantee.

The defence

[14] By way of the defence filed on 20 December 2013 on behalf of the respondents, they acknowledged receiving the credit card and demand loans from the Bank. The

respondents, however, denied the Bank's claim that they breached the loan agreements, promissory notes and credit card agreement by defaulting in the repayment of their debt.

[15] In relation to the credit card facility, it was averred that the Bank failed to provide them with regular statements. The respondents also averred that they were not made "fully aware" of the terms and conditions of the loans, as they were not provided with a copy of the loan agreements. They contended that the promissory notes did not specifically refer to the respondents as being either jointly or severally liable.

[16] Regarding the instrument of guarantee, the respondents neither agreed nor denied the Bank's averments. It was, however, stated that the instrument was signed without Mr Williams first obtaining legal advice or even being afforded the opportunity to read the document.

[17] The Bank's pleadings regarding the specific sum claimed as owed by the respondents on each facility was also denied. The respondents averred that they did not receive the demand letters from the Bank, and the amount claimed by the Bank did not reflect and account for payments they made. It was the respondents' case that the Bank was not entitled to the principal amount claimed or any interest thereon.

The Bank's evidence

Mr Anthony Boyd's first witness statement

[18] In support of its case, the Bank relied on the evidence of Mr Anthony Boyd who was the Senior Manager in charge of the Commercial Assets Recovery unit for the Bank, which position he had held for seven years. His evidence was adduced by way of his two witness statements dated 18 May 2017 and 12 June 2017.

[19] Mr Boyd's witness statement of 18 May 2017 reiterated the particulars of the credit card facility and three demand loans as stated above. The Bank, he further averred, generated monthly statements which were sent to the only mailing address which was provided by Mr Williams for SRUK.

[20] Regarding the first two demand loans (#8000021 for $8,000,000.00 and #8000022 for $5,000,000.00) incurred on 14 and 15 July 2011, it was Mr Boyd's evidence that as of 12 May 2017, the balance on each of those loans was accrued interest which remained outstanding. The principal loan amounts having been settled by the application of the sale proceeds, no additional interest accrued. Interest, however, continued to accrue on the credit card at a rate of 42% per annum on the total outstanding sum, which was "charged off" on 6 September 2013. Demand loan #8000047 also continued to accrue interest at the Bank's base rate of 15.75% (as at the time of this statement) plus 3.5% on its principal of $369,554.20.

Mr Anthony Boyd's second witness statement

[21] In his second witness statement, Mr Boyd explained that on 15 January 2012, SRUK defaulted on demand loans #8000021 and # 8000022, and on 15 October 2012, it defaulted on demand loan #8000047. No payment was ever made towards the principal sum on demand loan #8000021, however, one payment of $39,834.00 was made towards demand loan #8000022, which was later reversed.

[22] The interest payments made for both demand loans were irregular and pursuant to a direct debit from SRUK's deposit account between August 2011 and March 2012. That account was however, overdrawn and five of those direct debits were later reversed. The Bank received no further payments or direct debits after March 2012.

[23] The Bank consequently sold SRUK's property and applied $8,000,000.00 of the proceeds of sale to the principal for demand loan #8000021 and $5,000,000.00 of the proceeds of sale to the principal for demand loan #8000022. The sum of $6,610,519.94 and $2,165,168.98 claimed for each respective loan, represented accrued interest as at 12 June 2017.

[24] With respect to demand loan #8000047, one payment of $469,334.35 was made by SRUK on or about 1 January 2013. No payment was thereafter made towards the principal sum. Upon the sale of the property, $883,710.82 of the sale proceeds was applied by the Bank to the principal. The remaining principal was $369,554.20 and the interest accrued as at 12 June 2017 was $1,184,335.14.

[25] Regarding the credit card facility, only one payment of $105,391.00 was made on 28 August 2012. No further payments were subsequently received. The outstanding sum as at 6 September 2013 was $394,330.11, which included principal as well as accrued interest. That sum, he explained, became a "charge-off", which meant that it was subsequently converted to bad debt status and no longer accrued interest.

[26] Mr Boyd maintained that Mr Williams had given an unlimited guarantee and was consequently liable for all of SRUK's debts.

The notice of intention to tender documents

[27] On 26 May 2017, the Bank filed and served on SRUK, a notice of intention to tender into evidence certain documents, citing its inability to find the maker of the documents as its reason. The application was made pursuant to section 31F of the Evidence (Amendment) Act which addresses the admissibility of business documents in civil proceedings and Part 29 of the Civil Procedure Rules ('CPR') on evidence.

[28] That application was, however, opposed by Mr Bishop, on behalf of the respondents, who required the attendance of the makers of the documents and/or the statements in the documents, to be called. Counsel also objected to the admission of photocopies of the Bank's documents into evidence and required the production of the original documents or an explanation for the absence of same.

[29] The Bank was unable to provide the court with either the original documents or an explanation as to their whereabouts. Neither was Mr Boyd able to speak to the availability of the makers of the documents. The learned judge held that there was no basis for the admission of the documents into evidence. The Bank consequently abandoned its efforts to tender those documents.

The discovery that Mr Boyd's evidence regarding the loan balances came from a computer system

[30] Mr Boyd's evidence under cross-examination regarding the method employed in arriving at the quantum claimed, revealed that the figures referred to in his witness statements were derived from a computer system. It was his evidence that the total sum initially demanded of $16,941,228.00 was not arrived at by his calculations. It

was also his evidence that he had "some familiarity" with the "staff process of a loan". The Bank's action against SRUK was, therefore, a result of documents he received. He admitted that he was not present when the documents were created, but he would have been able to identify the makers by their signatures.

[31] It is helpful to quote Mr Boyd's further evidence under cross-examination by Mr Bishop regarding the method employed in determining quantum.

> "Ques: You did the calculations of interest in this matter personally?
>
> Ans: No
>
> Ques: Looking at paragraph 15 of the First Witness Statement, can you say if 16,941,228 is principal or principal with interest.
>
> Ans: As stated, it is principal plus interest.
>
> Ques: But it is true that you did not do this calculation.
>
> Ans: Physically No.
>
> Ques: Can you say if the person who did it used a computer
>
> Ans: Because the bank uses an automated system it is a system generated calculation.
>
> Ques: And that system, would you describe as a computer system.
>
> Ans: Yes
>
> Ques: that figure of 394,330.11 is computer generated?
>
> Ans: Yes
>
> Ques: Would you say it's [the] same for $6,610,519.94?
>
> Ans: Yes.
>
> …

Ques: What interest rate was used to calculate the $6,610,519.94?

Ans: As stated in the statement, paragraph 9, the Bank's base lending rate plus a spread of 2%.

Ques: You can't say for sure what was used because you didn't do it.

Ans: That was the rate that was applicable to the customer's loan.

Ans: Based on my review of the system and experience of the system, that was [the] rate that is [sic] used.

Ques: Before you signed this Witness Statement, did you check personal to see if this was the rate used.

Ans: I don't recall.

…

Ques: Onto the second Witness Statement, did you personally do any of the calculations?

Ans: No."

There was no re-examination of Mr Boyd.

The respondents' evidence

[32] Mr Dean Williams, on behalf of the respondents, by way of his witness statement, acknowledged that he guaranteed the loans in his personal capacity. He referred to the term of the credit card agreement, which stated that the Bank would provide SRUK with regular monthly statements, and contended that the Bank breached their agreement to provide same.

[33] Mr William's evidence was that he signed the documents at one of the Bank's branches but neither he nor any agent of SRUK received copies of those signed documents. Had they received same they would have been able to familiarize themselves with the terms and conditions of the agreements. He was unable to recall

if the promissory notes specifically referred to him or SRUK. He was also unsure whether the obligations were held jointly or severally.

[34] With respect to the instrument of guarantee, Mr Williams maintained that the Bank's agent presented him with several documents which he was instructed to sign immediately and which he "hurriedly" signed. He was not, therefore, afforded the opportunity to read the guarantee document, seek legal advice or "reflect and consider the terms of the documents".

[35] It was his evidence that several payments were made on the loans and credit card facility, but those payments were not reflected in the Bank's claim. Additionally, he denied receiving the Bank's demand letters. He expressed the view that, in the circumstances, the Bank was not entitled to either the principal amount claimed or any interest thereon.

[36] In cross-examination, upon being presented with photocopies of the aforementioned documents, Mr Williams claimed to be unable to recognise the signatures thereon. Consequently, they were not admitted into evidence.

[37] When confronted with the credit card debt of $394,330.11, Mr Williams stated that he had no knowledge of that debt. In response to queries as to whether he or SRUK made monthly payments to the Bank in respect of demand loan #8000021 between 2011 and 2017, Mr Williams stated "[n]one to my recollection". He also did not recall if SRUK made monthly payments in relation to demand loan #8000022 between 2011 and 2017 and demand loan #8000047 between 2012 to 2017.

Mr Leiba's closing address at the trial

[38] Mr Leiba, during his closing submissions, contended, *inter alia*, that the Bank's duty to prove liability was duly discharged. He further submitted that there was no direct challenge to the calculations of the sums claimed by the Bank. Those submissions, however, did not find favour with the learned judge.

[39] The learned judge expressed the view that the Bank bore the burden of proving how it arrived at the sum claimed and it was not for the respondents to disprove. He

observed the absence of evidence demonstrating the method employed by Mr Boyd in arriving at the figure claimed, and expressed his fear that the Bank might have been seeking to circumvent the requirements of the Evidence (Amendment) Act 2015 (the Act), by presenting the computer-generated information to the court in evidence through Mr Boyd's witness statements.

[40] Mr Leiba, however, contended that the witness statements having been admitted, stood. The issue for the court's determination, he posited, was the weight to be attributed to that evidence. According to counsel, the respondents acknowledged disbursement of the loan amounts and provided no evidence to contradict Mr Boyd's evidence. The court was, in those circumstances, entitled on a balance of probabilities to accept Mr Boyd's evidence.

Mr Bishop's response in closing at the trial

[41] Mr Bishop, however, argued that there was no distinction between a statement in a document produced by a computer or a statement derived from a computer. He maintained that Mr Boyd's indication that the Bank's figures were derived from a computer system, meant that the calculations were computer generated and thus were captured by section 31G of the Act. In light of that revelation, he pointed out there was no evidence that the computer from which the evidence was obtained, was in proper working order as required by that section.

[42] Mr Bishop contended that section 31G of the Act was worded to "prevent the admission of evidence", but acknowledged that that evidence was already admitted by way of Mr Boyd's witness statements without objection. He submitted that prior to Mr Boyd's admission under cross-examination that the figures were obtained from a computer system, he did not have a basis to challenge the admissibility of the witness statements, because the sum claimed could have been the result of Mr Boyd's own calculations.

[43] Relying on **National Water Commission v VRL Operations Ltd et al** [2016] JMCA Civ 19 ('**VRL'**), Mr Bishop further argued that in light of the fact that the Bank had not yet closed its case, and the fact that this issue was "critical and central"

to the Bank's case, the Bank ought to have sought leave to comply with the conditions of section 31G of the Act.

Mr Leiba's rebuttal at trial

[44] Mr Leiba, relying on the **VRL** case, submitted that the issue of admissibility was a preliminary point which should have been raised prior to the commencement of the trial. The witness statements having already been accepted as the Bank's evidence in chief, the burden shifted to the respondents to establish that the evidence being challenged, fell under section 31G.

[45] Counsel further contended that having simply raised "the spectre of a computer or computer system" in cross-examination, was insufficient. Mr Bishop, he submitted, ought to have put it to Mr Boyd that the computer from which he obtained his evidence fell within the definition set out in subsection 31G(7) of the Act. Having failed to do so, it was not open to Mr Bishop to later challenge the admissibility of Mr Boyd's evidence in his closing submissions, counsel argued.

The learned judge's findings

[46] The learned judge distilled from the Bank's pleadings that the main issue in the claim was the quantum of the debt due and owing to the Bank. He observed that reliance was placed solely on Mr Boyd's evidence and he remarked as follows:

> "[10] The Court was not required to make any rulings on the issue of hearsay in respect of the transactional documents because the [Bank] was content to present its case as to quantum largely in reliance on the evidence of its sole witness Mr. Anthony Boyd. Mr Bishop insisted that he would not consent to the admission of copies of the [Bank's] documents and required that the [Bank] produce the originals or explain their absence. As Sykes, J recognized in **Ann Marie Sinclair and Jackson v Mason and Dunkley Claim No Cl1995/s-188** (delivered 5 August 2009), a party seeking to rely on the grounds listed in subsection 31 E (4) of the Evidence Act must do so by evidence called at the trial. Mr Boyd, the [Bank's] sole witness, in giving evidence did not proffer an explanation as to the existence or non-existence of the originals nor did he give evidence in relation to the unavailability of any of the makers of the documents and accordingly there was

> no basis for admission of any of these documents. Although some documents were marked for identity, wisely, no application for admission was pursued."

[47] The revelation having been made that the witness statements contained evidence derived from a computer system, the learned judge considered the applicability of sections 31E and 31G of the Act and further opined as follows:

> "[24] However, having regard to **Robinson & the AG v Henry and Henry** (supra) and sections 31E and 31G in particular I have reached the conclusion that the admission into evidence of the information contained in the Second Witness Statement of Mr Boyd, pursuant to the order of the Court that it stands (in conjunction with his first witness statement) as his evidence in chief, was not an admission into evidence pursuant to sections 31E and 31G of the Evidence Act. However this finding notwithstanding, I also find that sections 31E and 31G are applicable to his evidence by virtue of his admission that the original source of his information was a computer or a computer system. In my view section 31E clearly contemplates its applicability to first hand hearsay in civil proceedings. Although as a consequence of the methodology employed in the reception of Mr Boyd's evidence initially, that is to say, as original first hand evidence in chief, it is at least arguable that it may not be now open for this Court to retroactively find that this portion of his evidence is inadmissible. The basis for this would be due to non compliance with section 31G as Mr Bishop has urged the Court to find (or for non compliance with 31 E).
>
> [25] I do not think it is necessary for me to do so and I will not venture to make a conclusive finding on the admissibility point as it relates to the evidence act because in light of **Robinson & the AG v Henry and Henry** it is beyond argument that the Court can find that the evidence of Mr Boyd is unreliable as a consequence of such non compliance and also find that such evidence is insufficient to satisfy the Court on a balance of probabilities. I do so find, largely as a result of the fact that Mr Boyd's evidence does not provide any supporting basis on which the Court can conclude that the computer generated evidence is reliable.
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> …

> [38] The Claimant has not demonstrated the accuracy of the figures which it has presented to the Court. The Court is being asked to accept the figures presented because a computer or computer system has churned them out and Mr Boyd is relying on them. Of paramount importance in the Court's assessment is the fact that Mr Boyd was not able to verify to the satisfaction of the Court that he checked the calculation of the figures and also the fact that the Court has not been provided with the source data including the base rate of interest as it fluctuated from time to time. As a consequence of these deficiencies the Court has been deprived of any opportunity to independently test the accuracy of the final figures claimed in respect of each facility.
>
> [39] Whereas it appears that there may be a debt owing to the Claimant arising from, at the very least, accrued interest, having considered all the evidence in the round, I find that the Claimant has not satisfied the Court on a balance of probabilities that the quantum it has pleaded as being owed, is in fact owed. The Claimant has been put to proof in respect of this sum and has failed to prove its case in this regard. Having arrived at this conclusion it is unnecessary for me to address other issues which were raised during the trial including *inter alia*, whether the Promissory Notes and the Guarantee are enforceable against the 2nd Defendant, whether there was a legal obligation to provide the transactional documents and monthly statements to the Defendants or any of them, whether they were in fact provided and if not provided whether a failure to do so could provide a defence if the debt was proved…"

[48] He concluded that the Bank had failed to prove its case on a balance of probabilities and consequently on 28 June 2017, made the following orders:

> "1. Judgment in favour of the [respondents].
>
> 2. Costs of the claim to the [respondents] to be taxed if not agreed."

The appeal

[49] Dissatisfied with the learned judge's decision, the Bank filed the following grounds of appeal:

"a) Having regard to the narrow issues joined between the parties on the pleadings before the Court, that being primarily one of quantum, the learned Judge erred in finding that the evidence before him was not sufficient to establish the Claimant's case.

b) The learned Judge erred in applying the same standard of proof utilized and applied by this Court in the case of **Robinson & Attorney General v Henry & Henry [2014]** JMCA Civ 17 in which fraud was alleged and there was conflicting evidence on the point, to the matter to be determined before him, where there was unchallenged evidence on a claim for monies due and owing.

c) The learned Judge erred in applying and relying on the decision of **Robinson & Attorney General v Henry & Henry** [2014] JMCA Civ 17, without presenting Counsel with the opportunity to submit on the aforementioned authority and its applicability to the case before the Court below.

d) The learned Judge's [sic] erred in finding that the evidence of Mr. Boyd regarding the Appellant's computation of the quantum owed did not stand as evidence before the Court, considering no objection was made by the Respondent[s] regarding the admissibility of the said evidence during the trial.

e) The learned Judge erred in finding that there was not enough evidence put before the Court to determine the quantum owed by the Respondents to the Appellant, especially in light of the fact that the evidence presented at trial regarding the principal, interest rates, and deductions were not challenged by the Respondents.

f) The learned Judge erred in permitting the Defendant's Counsel to submit on and accepting the Defendant's Counsel's submission regarding whether the evidence of the Claimant's witness was computer generated information in circumstances where it was not put to the witness, Mr. Anthony Boyd, that his evidence was generated from a computer as defined under the Evidence Amendment Act 2015."

[50] The Bank sought the following orders:

> "a) That Judgement of the Honourable Justice Laing be set aside.
>
> b) That [the] Judgement be entered for the Appellant against the Respondents in terms of reliefs set out in the Amended Particulars of Claim filed May 22, 2013 with costs of the Appeal and cost below to the Appellants to be agreed or taxed."

The law

[51] Sections 31E and 31G of the Act provide:

> "31E. - (1) In any civil proceedings, a statement made, whether orally or in a document or otherwise, by any person (whether called as a witness in those proceedings or not) shall subject to this section, be admissible as evidence of any facts stated therein of which direct oral evidence by him would be admissible.
>
> (2) Subject to subsection (6), the party intending to tender such statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be tendered, notify every other party to the proceedings as to the statement to be tendered, and as to the person who made the statement.
>
> (3) Subject to subsection (4), every party so notified shall have the right to require that the person who made the statement be called as a witness.
>
> (4) The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made the statement if it is proved to the satisfaction of the court that such person-
>
> (a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily harm.

(5) where in any civil proceedings a statement which was made otherwise than in a document is admissible by virtue of this section, no evidence other than direct oral evidence by the person who made the statement or any person who heard or otherwise perceived it being made shall be admissible for the purpose of proving it.

(6) The court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with or modify in relation to any party to the proceedings, the requirements for notification as specified in subsection (2).

(7) Where the party intending to tender a statement in evidence has called, as a witness in the proceedings, the person who made the statement, the statement shall be admissible only with the leave of the court.

…

31G - (1) Subject to the provisions of this section, in any proceedings, a statement in a document or other information produced by a computer shall not be admissible as evidence of any fact stated or comprised therein unless it is shown that -

(a) there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer; and

(b) at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.

(2) Subject to subsection (3), in any proceedings where it is desired to have a statement or other information admitted in evidence in accordance with subsection (1) above, a certificate —

(a) dealing with any of the matters mentioned in subsection (1); and

(b) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer,

shall give rise to a presumption, in the absence of evidence to the contrary, that the matters stated in the certificate are accurate, and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

…

(7) In this section, 'computer' means any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data, and includes any data storage facility or electronic communications system directly connected to or operating in conjunction with such device or group of such interconnected or related devices."

Grounds d and f

[52] These grounds can conveniently be dealt with together as both address the issue of whether Mr Boyd's witness statements having already been admitted without objection, could retroactively be found inadmissible by virtue of sections 31E and 31G of the Act. These grounds will also be considered first as the evidence on which the

Bank relied in support of its claim was derived primarily from documents generated by a computer system.

[53] As noted above, because of Mr Bishop's objection to the Bank's notice to tender documents, the Bank relied solely on Mr Boyd's witness statements. There was no objection to the reception of those witness statements which contained evidence extracted from the Bank's documents and were admitted for their full content.

[54] At the close of the case, the learned judge expressed concern about the manner in which the Bank's evidence, which seemed to have been derived from a computer system, was put before the court. It was Mr Leiba's position that the learned judge's only determination should be the weight to be attributed to that evidence, since the statements had already been admitted. Mr Bishop argued in his closing address that the court ought not to place any reliance on Mr Boyd's evidence on the ground that it was obtained from a computer system and did not satisfy the requirements of the Act.

[55] In his decision, the learned judge opined:

> "[14] The point was well made by Mr Bishop that up until the point when the admission was made by Mr Boyd in cross examination as to the source of the evidence contained in his second witness statement (relating to the various amounts being claimed and the interest payments), it could not have been known that the original source of this information was computer generated. This is so Counsel said, because presumably it may have been possible for this information to have been produced by the personal and exclusively human efforts of Mr Boyd exercising his mathematical acumen. As a consequence there was no earlier opportunity for the Defendants to challenge the admissibility of this evidence on the basis of non compliance with section 31G of the Evidence Act, in the same way that one would have done where there is a document which is obviously on its face, a computer generated document.
>
> …
>
> [28] Mr Leiba submitted in the alternative that once it was raised in cross examination that the evidence of Mr Boyd fell within the bounds of section 31G, the onus was on the party making that assertion to prove it. Counsel noted that

> section 31G (7) of the Evidence Act provides a very specific definition of a computer and it was not sufficient for a litigant, in this case the Defendants, to simply raise the spectre of a computer or computer system then in submissions assert that the relevant portion of the evidence of the witness was inadmissible. It was submitted that it was necessary for the cross examiner to suggest to the witness that the computer was one which fell fully within the definition set out in subsection 31G (7). It was further submitted that in this case, such a suggestion not having been put to the witness it was not open to Counsel for the Defendants to challenge the admissibility of the witness' evidence in closing submissions.
>
> [29] Whereas there is obviously a responsibility on a litigant to suggest its case generally, it is my view that the obligation is placed on the litigant who is intending to rely on the computer generated information or information derived from a computer to establish that it has satisfied the conditions as to admissibility and this obligation remains on that party throughout. It appears to me that once a litigant in cross examination extracts an admission that information was obtained from "a computer" or a computer system as occurred in this case then the Court is entitled to find that the 'computer' is one which falls within the ambit of subsection 31G (7) if there is evidence to support such a finding. The party seeking to rely on information which it knows, or ought to know, is derived from a computer as defined by subsection 31G (7) cannot by failing to disclose this fact, gain an unfair advantage after its discovery by seeking to place the responsibility on the cross examiner to go further by having to suggest to the witness that the computer was one which fell fully within the definition as set out in subsection 31G(7)."

The Bank's submissions

[56] Mr Morgan, counsel for the Bank on appeal, submitted that the learned judge erred in allowing the respondents to object to the admissibility of the evidence contained in Mr Boyd's witness statements, for the first time during their closing submissions. The appropriate time to have objected, he submitted, was at the latest, during the cross-examination of the witness. In support of that submission, Mr Morgan referred the court to the Caribbean Court of Justice case, **Guyana Bank for Trade and Industry v Desiree Alleyne** [2011] CCJ 5 (AJ) ('**Guyana Bank v Alleyne**') in which it was held that computer printouts were duly adduced as evidence of the

defendant's indebtedness to the Guyana Bank in the absence of an objection as to its admissibility.

[57] Counsel contended that it was manifestly unfair to allow the respondents to object in that manner, and at that juncture. He submitted that had the respondents objected during cross-examination, the Bank would have had an opportunity to seek leave to produce the appropriate certificate, in accordance with section 31G of the Act, before closing its case. The objection to the admissibility of the evidence having been taken at the end of the proceedings, led the Bank to believe that the evidence was unchallenged, he argued.

[58] Relying also on the work of the learned authors of Phipson on Evidence, 16th Edition, paragraph 12-12, Mr Morgan further submitted that the respondents' failure to put their case, that the computer system from which Mr Boyd's evidence was derived met the definition of "computer" as defined by section 31G (7), robbed the Bank of the opportunity to explain any misunderstanding and to address that objection in re-examination.

The respondents' submissions

[59] Mr Bishop, however, submitted that Mr Boyd failed to divulge in his witness statements, the accounting or mathematical formula which was applied to determine the sum claimed in his witness statement. He pointed out that it was not until the cross-examination of Mr Boyd that it was revealed that the calculations were not done by him. Prior to that revelation, there was no basis for objecting to his evidence.

[60] Counsel argued that although the elicitation of that evidence under cross-examination was not akin to an objection, it would have put the Bank's counsel on notice to address the issue of computer-generated evidence. He noted that, even upon those revelations, Mr Leiba did not take the opportunity to re-examine Mr Boyd.

[61] Regarding the requirements of section 31G of the Act, counsel submitted that there was no evidence that at the time the calculations were generated, the computer was in proper working order nor was there evidence that the computer was properly maintained. Accordingly, the Bank did not comply with the Act.

[62] Counsel, therefore, contended that the learned judge carefully considered the evidence and made his decision based on law. That decision was that he would not give any weight to the statements relating to the calculation of the debt because they offended section 31G of the Act.

Analysis

[63] The reception of computer-generated evidence is governed by section 31G of the Act, which provides that a statement in a document or other information produced by a computer is not admissible as evidence of any fact unless certain requirements are satisfied. This issue arose on Mr Boyd's cross-examination, which confirmed that his evidence in relation to the quantum of debt, was entirely derived from documents produced by a computer system.

[64] The facts of the **Guyana Bank v Alleyne** case, on which both counsel relied, were similar to the instant case, as it addressed a company's indebtedness to the Guyana bank, for which the respondent in that matter was the alleged guarantor. The witness for Guyana Bank tendered computer printouts of the company's account with Guyana Bank, and disclosed to the court that they were obtained from the records on Guyana Bank's computer system. In response to Roy J's (the first instance judge) enquiry of the respondent as to whether there was any objection to the admission of the printouts into evidence, her counsel chose not to object.

[65] On appeal to the Guyanese Court of Appeal, the respondent's counsel's submission that the computer printouts of the alleged statement of accounts between the company and Guyana Bank were inadmissible, found favour with the Court of Appeal. The Court of Appeal further held that the respondent's counsel could not consent to the admission of evidence which did not comply with section 91 of the Guyanese Evidence Act**,** which section dealt with the admissibility of documents produced by a computer. Section 91 contains similar provisions to section 31G of our Act. A re-trial was consequently ordered by the majority of the court.

[66] Aggrieved by the Court of Appeal's decision, Guyana Bank appealed to the Caribbean Court of Justice ('CCJ') on *inter alia* the issue of the admissibility of the computer printouts. The CCJ held that, in civil cases, a defendant can agree to the

admission of particular facts without the need for any formal proof in the interests of a speedy, but fair trial of the real issues in dispute. The CCJ noted that Roy J specifically enquired whether there was any objection to the tendering of the computer printouts and there was none. Counsel for the respondent could not thereafter properly object to their admission on appeal. The documents were, therefore, properly admitted.

[67] Relying on Lord Porter's statement in **Tyne Improvement Commissioners v Armement Anversois SA (The Brabo) (No 2)** [1949] AC 326, in which it was held that full effect should be given to the contents of an affidavit which was technically defective because there was no objection to its admissibility, the CCJ concluded that having allowed the printouts to be admitted, the respondent could not object to its admission on appeal.

[68] Hayton J, writing on behalf of the CCJ, said that although Lord Porter cited no authority, he could have relied on these two old English cases:

> "[58] …. In **Goslin v Corry**, Tindall CJ stated 'whenever counsel allow evidence to be given that is not strictly and properly admissible they must submit to all the consequences which result', while Cresswell J stated 'If counsel think proper to permit evidence to be given that is not strictly admissible they cannot afterwards require it to be withdrawn.' In **Gilbert v Endean** Cotton LJ stated 'Where in the court below the evidence not being strictly admissible, if the person against whom it is read does not object but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order [of the court below] on the ground that the evidence was not admissible'.
>
> [59] The English common law position is reflected in the common law in Australia summarized in C T McCormick's Law of Evidence (1954) para 54 as follows:
>
> 'A failure to make a sufficient objection to evidence which is incompetent waives … any ground of complaint of the admission of the evidence. But it has another effect, equally important. If the evidence is received without objection, it becomes part of the evidence in the case, and is usable as proof to the extent of whatever rational persuasive power it may have. The fact that it was

> inadmissible does not prevent its use as proof so far as it may have probative value.'
>
> **[60] Thus, unless clearly prohibited by some exceptional statute, counsel in civil cases are free to choose to consent (or not object) to the admission of evidence that would be inadmissible if objection were taken and, if they so choose, the evidence must be given its full probative value and no objection to its admission may be taken on appeal**." (Emphasis supplied)

[69] Support for that view was again registered by the CCJ in **Ganga Charran Singh v Ram Singh and Rajcoomarie Singh** [2014] CCJ 12 (AJ), in which Justice Hayton speaking again on behalf of the CCJ, said:

> "[19] It is necessary, however, to emphasise that in civil cases tried by a judge if no objection is taken to hearsay evidence at the time it is being given in the witness box, such evidence is admitted as part of the evidence in the proceedings, as explained in detail by this Court in *Guyana Bank for Trade & Industry v Alleyne* and in *Sheermohammed v S A Nabi & Sons Limited* [2011] CCJ 7 (AJ), (2011) 78 WIR 364 [38]-[39]*…"*

[70] The **Guyana Bank v Alleyne** case and the cases to which the CCJ referred, despite their similarity to the instant case, are distinguishable. In **Guyana Bank v Alleyne**, it was disclosed that the printouts were produced by a computer system. The potential inadmissibility of the printouts was therefore brought to the attention of the court prior to its admission. Upon enquiry by Roy J there was no objection and the printouts were consequently admitted by consent.

[71] In the instant case, reliance was placed on Mr Boyd's two witness statements. His evidence was initially presented as first-hand evidence and there were no concerns as to its potential inadmissibility. Unlike the **Guyana Bank v Alleyne** case, it was during the cross-examination of Mr Boyd, that it was disclosed that the evidence contained in those statements, which were already admitted, and without objection, was derived from a computer system.

[72] Notwithstanding the distinguishable features of the instant case, the principle enunciated by Hayton J on behalf of the CCJ, supported by the authorities to which he referred, is applicable. In the absence of an objection to the reception of hearsay evidence in civil cases, whether counsel consented or failed to object, inadmissible evidence can be admitted for its full probative value. Indeed, failure to object is tantamount to consent.

[73] The learned authors of Phipson on Evidence, 16th Edition, to which Mr Morgan directed our attention, confirmed those views. Paragraph 12-12 states:

> "In general, a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected."

[74] The general rule is that a party intending to challenge the admission of evidence on a particular point, ought to cross-examine the witness through whom the evidence is adduced. Although it was belatedly revealed during the cross-examination of Mr Boyd that the source of his evidence was a computer system, counsel sought not to pursue the matter. Counsel, Mr Bishop, ought to have put to Mr Boyd that his evidence, having been obtained from a computer system, fell within the definition of "computer" as defined by subsection 31G (7) of the Act. Had Mr Boyd responded in the affirmative, counsel ought to have, at that juncture, objected to the admission of the relevant parts of his evidence which failed to comply with the requirements of section 31G of the Act.

[75] Having failed to do so, Mr Bishop could not during closing submissions, properly object to the admission of the evidence retrospectively, which had already been admitted for its full content. It was in fact during Mr Leiba's closing address that the learned judge raised the issue of how the court should treat Mr Boyd's evidence in light of his disclosure. Mr Bishop was, in the circumstances, obliged to submit on it. Mr Bishop's belated submission that the evidence, having been derived from a

computer system, fell within the ambit of section 31G of the Act, cannot be regarded as an objection to its admissibility. The witness statements were, therefore, admitted for their full probative value, which the learned judge appreciated as demonstrated by the paragraphs cited at paragraph [47] herein (sections of which are repeated here for emphasis):

> "[24] … Although as a consequence of the methodology employed in the reception of Mr Boyd's evidence initially, that is to say, as original first-hand evidence in chief, it is at least arguable that **it may not be now open for this Court to retroactively find that this portion of his evidence is inadmissible.** The basis for this would be due to non-compliance with section 31G as Mr Bishop has urged the Court to find (or for non- compliance with 31 E).
>
> [25] I do not think it is necessary for me to do so and I will not venture to make a conclusive finding on the admissibility point as it relates to the evidence act because in light of **Robinson & the AG v Henry and Henry** it is beyond argument that the Court can find that the evidence of Mr Boyd is unreliable as a consequence of such noncompliance and also find that such evidence is insufficient to satisfy the Court on a balance of probabilities…" (Emphasis supplied)

[76] Contrary to the Bank's submissions, there was no finding made by the learned judge that Mr Boyd's evidence was inadmissible. In fact, the learned judge recognised that he was unable to retroactively find that the evidence adduced through Mr Boyd was inadmissible. In light of the foregoing, grounds d and f fail.

Grounds a and e

[77] Grounds a and e will be dealt with together, as these grounds concern whether the learned judge erred in finding that the evidence in support of the Bank's case was unreliable and insufficient.

The Bank's submissions

[78] Mr Morgan submitted that the learned judge incorrectly weighed Mr Boyd's evidence against what he considered to be evidence required to prove such claims. It

was, in the circumstances, open to this court to determine the level of proof required, he submitted.

[79] Counsel pointed to the respondents' following admissions by way of their defence, which he submitted, rendered the Bank's assertions unchallenged:

a) SRUK signed the relevant agreements;

b) Mr Williams signed an instrument of guarantee;

c) the quantum of the loans;

d) the terms of repayment; and

e) the applicable interest rates.

Those admissions, Mr Morgan argued, were pertinent and ought to have been considered by the learned judge.

[80] Counsel also referred to Mr Boyd's second witness statement, which he submitted, particularized the method applied in the calculation of the sum claimed and the applicable deductions. He submitted that not only was that evidence unchallenged at trial, there was no objection to its admissibility.

[81] He, however, conceded that the Bank failed to disclose the total amount of the sale proceeds, but contended that when the Bank is suing for the surplus, there is a presumption that the total proceeds would be applied.

[82] The learned judge, according to Mr Morgan, fell into error by his finding that the Bank's evidence, having been admitted and the substance remaining unchallenged, was of no value. He further posited that the respondents having:

a) failed to put their case to Mr Boyd;

b) failed to challenge the admissibility of Mr Boyd's evidence under cross-examination; and

c) made positive assertions regarding the sum owed,

had misled the Bank into believing that they were not challenging the admission of that evidence. As already indicated, counsel complained that it was manifestly unfair to have allowed the respondents, at the close of the hearing, to submit that Mr Boyd's evidence did not comply with the Act.

[83] Counsel pointed to the learned judge's rejection of the Bank's claim for both liability and quantum, and posited that he ought to have, at the very least found liability, after which the quantification could have been dealt with in a different manner.

The respondents' submissions

[84] Mr Bishop, in support of the learned judge's findings and decision, directed the court's attention to Mr Boyd's witness statements, which he indicated was the only evidence before the court in support of the Bank's case. He noted that Mr Boyd's first witness statement outlined the loan dates, amounts, interest rates and the documents signed by the respondents to secure those facilities, and the second witness statement stated the default dates and the amount due on each facility.

[85] Counsel also pointed to the failure of Mr Boyd's witness statements to disclose the accounting or mathematical formula which was applied in determining the interest and total amount due on each facility, especially in light of the Bank's failure to produce any original documents in support of its case.

[86] He further referred to Mr Boyd's evidence under cross-examination which revealed that:

a) Mr Boyd was not present when the loan agreements were signed;

b) Mr Boyd was unfamiliar with those documents, having only received them to pursue the debt;

c) Mr Boyd did not personally calculate the interest claimed; and

d) The person who was responsible for doing those calculations, relied on a computer system.

[87] Mr Bishop submitted that the only evidence for the learned judge's deliberation was that of Mr Boyd's and Mr Williams'. He reminded the court that it was the learned judge's responsibility to determine the admissibility of that evidence and the weight to be attached to it. Regarding the weight to be attached to Mr Boyd's evidence, Mr Bishop pointed to the fact that the greater part of the sum claimed was for interest, and Mr Boyd knew little to nothing about how that sum was calculated. He submitted that, in light of the foregoing, Mr Boyd was unable to verify the quantum claimed to the satisfaction of the court.

[88] Counsel further argued that although the elicitation of the source of Mr Boyd's evidence upon cross-examination was not akin to an objection, the Bank's attorneys-at-law were put on notice to address the issue of computer-generated evidence. He also pointed to the Bank's failure to:

a) re-examine Mr Boyd, in spite of those revelations;

b) produce any original documents; and

c) provide any document in support of its case.

[89] Counsel reminded the court that the Bank abandoned its efforts to admit its bundle of documents because of the unavailability of the originals, which could not be found, and further, that due to Mr William's evidence under cross-examination, that he was unable to recognize any of the signatures on the photocopy documents. Mr Bishop contended that the learned judge carefully considered the evidence and correctly arrived at findings which were in accordance with the law. He consequently attached no weight to the statements regarding the calculation of the debt which offended section 31G of the Act.

Analysis

[90] The respondents admitted to having obtained the three demand loans and the credit card facility from the Bank. It was Mr Williams' evidence in cross-examination that he did not recall any monthly payments being paid to the Bank between 2011 to 2017 on the demand loans. The learned judge, therefore, correctly identified the determinative issue, as the quantum of debt owed by the respondents to the Bank. It is settled law that he who asserts must prove. It was, therefore, the Bank's responsibility to prove, on a balance of probabilities, that the amount claimed was in fact due and owing.

[91] In support of its claim, the Bank relied on Mr Boyd's witness statements. The learned judge, however, rejected his evidence. He opined that the Bank's claim failed for reasons related to:

a) the reliability of the evidence; and

b) the weight that could be attached to that evidence.

[92] Although the witness statements stood as evidence, it was the learned judge's duty to determine the weight to be attached to that evidence. He expressed his concern thus:

> "[31] In considering whether the Claimant has satisfied the Court on a balance of probabilities that the debt claimed is in fact due and owing, the Court finds that this is a weakness in the Claimant's case. The evidence in chief of Mr Boyd as contained in his Second Witness Statement related to, inter alia, information as to principal balances and calculation of interest. There was also evidence as to payments that were applied to principal balances as a result of the sale of property which was being held as security by the Claimant. **There was however no evidence before the Court as to the sale price of the property or of any costs, fees or other disbursements associated with the sale**." [Emphasis supplied]

[93] The learned judge consequently found that the Bank's evidence regarding the quantum claimed was insufficient and unreliable. In justifying that finding, the learned judge scrutinized Mr Boyd's evidence regarding the various loan facilities and the interest rates applied, as follows:

> "[33] Mr Boyd's evidence is that in respect of the **demand loan facility number 8000021** in the sum of eight million dollars ($8,000,000.00), [SRUK] agreed a **rate of interest payable at a fixed rate of 14.75% per annum for 12 months from the date of the loan and thereafter interest would accrue at the Banks [sic] base lending rate plus 2%.** He provided the present effective rate (presumably as at the date of his statement 18th May 2017 as 17.75% per annum). What the Court has therefore are 2 snapshots of the interest rate, one during the first 12 months and one as at May 2017 with no indication as to what the various positions were in between that period.
>
> [34] In relation to the **demand loan facility number 8000047** in the sum of one million seven hundred and twenty two thousand five hundred ninety nine dollars and thirty seven cents ($1,722,599.37), Mr Boyd's evidence is that the [Bank] agreed to lend and [SRUK] agreed to **the Bank's base lending rate plus 3.5%. He stated that the current rate is 15.75% and that interest is currently accruing at rate of 19.25% but there is no evidence as to the effective rate at which interest accrued over the entire period for which interest is being claimed.**
>
> [35] As it relates to the **demand loan facility number 8000022** in the sum of five million dollars ($5,000,000.00) Mr Boyd stated that the **agreed rate of interest was 8.95%** per annum and following the repayment of $5,000,000.00 from the proceeds of the sale of the property, there is now due and owing the sum of $2,165,168.98. **Because there was a fixed interest rate in respect of this facility then one could conceivably check the sum claimed if one has a date from which the interest payments ran.** However Mr Boyd speaks of irregular monthly payments which were made pursuant to direct debit from a deposit account between 2nd August 2011 and March 2012. There is no indication given of the total of these payments and

> accordingly it is unclear how the final figure stated to be due was arrived at.
>
> [36] The [Bank] claims a debt accrued on the **credit card** of three hundred and ninety four thousand three hundred and thirty dollars and eleven cents ($394,330.11) as at 12th May 2017 but **there is no evidence provided as to the purchases which formed the basis for the application of interest at 42% per annum** prior to the card being charged off as a result of this sum being converted to the status of a bad debt with the result that interest no longer accrues"
>
> [37] **The fact that there were various interest rates applied over time makes it imperative that the calculations be demonstrated to the satisfaction of the Court, or demonstrable, especially in the context of this claim where a significant portion of the debt alleged is as a result of accrued interest**…" (Emphasis supplied)

[94] By 12 June 2017, the date of Mr Boyd's second witness statement, the majority of the debt claimed was accrued interest. The principal amounts of $8,000,000.00 for demand loan #8000021 and $5,000,000.00 for demand loan #8000022 were satisfied with the proceeds of the sale of the property. The debt of $6,610,519.94 claimed for demand loan #8000021 and $2,165,168.98 for demand loan #8000022 was, therefore, accrued interest only. Additionally, there were an undisclosed number of interest payments on both loans, pursuant to direct debits from the respondents' deposit account, five of which were reversed along with a one-time payment of $39,834.00 on demand loan #8000022.

[95] As it relates to demand loan #8000047, the debt was reduced to a remaining principal of $369,554.20 and accrued interest of $1,184,335.14 by virtue of a payment of $469,334.35 and the application to the principal of $883,710.82 from the proceeds of sale. Likewise, the debt owed on the credit card facility of $394,330.11 included principal and interest, as there was only one payment of $105,391.00.

[96] The learned judge considered the fact that the interest rates for the credit card facility and demand loan #8000022 were fixed at 42% and 8.95% respectively, whereas the interest rates applied to demand loans #8000021 and #8000047 were a

combination of their respective fixed rates plus the Bank's base lending rate, which fluctuated from time to time. The learned judge was of the view that the reliability of the figures was, in the circumstances, affected.

[97] As observed by the learned judge, the Bank failed in its duty to provide the court with evidence of the various fluctuating interest rates that were applied over the years. The learned judge's finding that the figures to which Mr Boyd referred in his evidence were "not beyond human calculation or a confirmatory check by Mr Boyd" cannot be impugned. Moreover, his observation is correct that in light of Mr Boyd's evidence that the Bank's base rate at times fluctuated, a confirmatory check was especially necessary.

[98] The learned judge's concern regarding the absence of any evidence as to the circumstances of the sale of the property and the amount of the net proceeds, was also justified. The fact that the Bank indicated that certain sums from the proceeds of the sale were applied to the principals of the demand loans without indicating the total proceeds of the sale is unacceptable. Even if the Bank's evidence in that regard were to be accepted, the learned judge was also deprived of sufficient information regarding the total number and amounts of the direct debits applied to demand loans #8000021 and #8000022. Such information was crucial to the learned judge's determination of the reliability and accuracy of the Bank's evidence.

[99] Instead, the Bank merely presented the court with figures which it claimed as a debt. The court was, therefore, put in a position where it was unable to confidently accept as accurate, the quantum claimed. I am of the view that Mr Morgan has not demonstrated that the learned judge's findings regarding the loans, were arrived at by his failure to consider relevant facts or by his consideration of extraneous or irrelevant matters. Consequently, notwithstanding the respondents' admission to making no payments between 2011 and 2017, the learned judge's ruling that the Bank failed to substantiate the amounts owed on the loans, cannot be impugned.

[100] In relation to the credit card facility, the Bank sought to claim as the respondents' debt, the sum of $394,330.11 which included principal and interest, having deducted a one-time payment of $105,391.00. Although the learned judge's

observation that the Bank provided no evidence as to the purchases which formed the basis of their claim, is correct, it is of great significance that the respondents, having acknowledged receipt of the credit card, did not allege that they did not utilize it or that it was unlawfully used by another.

[101] The evidence, notwithstanding the respondents' contention that they did not receive statements, is that the credit card statements were sent to the address provided by Mr Williams. In any event, it is my view, that even if they did not receive the statements, their obligation to repay the debt which was incurred, would not be extinguished. Additionally, their argument that the Bank's account did not reflect several payments made by them, must fail since they did not provide any evidence of such payments.

[102] Unlike the demand loans, factors such as the fluctuating interest rates, payments from the sale proceeds and direct debit payments did not apply to this debt. In the circumstances, the credit card debt claimed by the Bank as outstanding, is easily calculable since from its issuance on 18 July 2011 to its charge-off on 6 September 2013, the interest rate was fixed at 42%. Also, as indicated by the Bank, subsequent to the charge-off, interest no longer accrued on this facility.

[103] The learned judge's finding that the Bank's evidence was unreliable and insufficient would not, therefore, be applicable to the evidence in relation to the credit card facility. Consequently, the Bank's claim for the sum of $394,330.11 succeeds. Grounds a and e, therefore, fail in part.

Grounds b and c

[104] These grounds address the issue of whether the learned judge erred in relying on **Desmond Robinson and the Attorney General v Brenton Henry and Sarah (Butt) Henry** [2014] JMCA Civ 17 ('**Robinson v Henry'**) in his analysis without allowing counsel the opportunity to submit on it.

[105] The learned judge, in considering the interpretation of sections 31E, 31F and 31G of the Act, referred to and relied on the **VRL** case in which Morrison P considered Panton P's dictum in the case of **Robinson v Henry.**

The Bank's submissions

[106] Counsel Mr Morgan complained that neither Mr Leiba nor Mr Bishop was given an opportunity to submit specifically on the **Robinson v Henry** case. According to him, it was in the interest of justice that counsel should have been notified of any authority on which the court intended to rely in its determination.

[107] Counsel conceded that the case of **Robinson v Henry** of which he complained, was referred to in **VRL**, a case on which both counsel relied. His contention, however, was that the facts of **Robinson v Henry** were wholly disparate as they concerned:

a) contested facts as to the seizure of a motor vehicle;

b) allegations of fraud; and

c) competing contentions regarding the source of the motor vehicle.

[108] The court in that case, counsel argued, weighed the contradictory evidence of each party and preferred the evidence of one party over the other, whereas in this case, there was "copious unchallenged evidence" which established that sums were in fact owed.

[109] Counsel postulated that, in the circumstances of that case, the weight attributed to the evidence by the learned judge sufficiently distinguished it from the instant case. If the Bank were permitted to submit on **Robinson v Henry**, argued counsel, the learned judge might have been convinced by their arguments and applied the decision differently.

The respondents' submissions

[110] Counsel Mr Bishop, for the respondents, contended otherwise. It was his submission that although judges at times alert counsel to cases that may be critical for their perusal and comments, there is no rule or law requiring same. A judge is under no duty to always extend that courtesy to counsel.

[111] In support of his contention that such courtesy was unnecessary in the instant case, Mr Bishop argued that **Robinson v Henry** introduced no novel principle, it merely restated old principles of law.

Analysis

[112] It is axiomatic that fairness is a hallmark in the conduct of trials. The scales of justice must be fairly balanced. There may well be cases that, in the interests of justice, a court should not rely on an authority that counsel have not had an opportunity to address upon. Depending on the impact of the authority, a course of prudence would be for the court to consider asking the parties to make submissions on that authority.

[113] The case of **Robinson v Henry,** however, about which the Bank complained, was not one which was sprung upon counsel by the learned judge in his decision, thus denying them the opportunity to submit on it. That case was cited and discussed in **VRL**, relied on by both parties. Not only ought counsel to have been duly apprised of the **Robinson v Henry** case and its relevance to the issues of this case, there was ample opportunity for both counsel to become *au fait* with the case and to submit on it if they considered it necessary. Indeed, counsel had the opportunity to do so if he considered that it would advance his client's case or it was necessary to distinguish it from the facts of the instant case.

[114] In his deliberations, the learned judge was obliged to give due consideration to the cases cited and relied upon by the parties as well as the authorities referred to in those cases. It would have been prudent of both parties to also submit on the application of the **Robinson v Henry** case to the instant, it having been examined in **VRL**. Accordingly, grounds b and c fail.

Conclusion

[115] With the exception of grounds a and e in part, there is no merit in the grounds of appeal advanced by the Bank. The learned judge's decision in relation to demand loans #8000021, #8000022 and #8000047 cannot be impugned. The appeal in respect of the credit card facility should, however, succeed. As the respondents have

succeeded on the greater part of the appeal, in keeping with rule 64.6 of the CPR that costs follow the event, in my view, the respondents are entitled to 75% of their costs. In light of the foregoing, I would order:

1. The appeal is allowed in part.
2. The order of Laing J made on 28 June 2017 with regard to demand loans #8000021, #8000022 and #8000047, is affirmed.
3. The order of Laing J made on 28 June 2017 with regard to the credit card facility is set aside.
4. Judgment entered for the appellant on the claim for the credit card facility in the amount of $394,330.11.
5. 75% costs to the respondents both here and in the court below, to be taxed if not agreed.

EDWARDS JA

[116] I have read the draft judgment of Sinclair-Haynes JA. I agree and have nothing further to add.

PHILLIPS JA

ORDER

1. The appeal is allowed in part.
2. The order of Laing J made on 28 June 2017 with regard to demand loans #8000021, #8000022 and #8000047, is affirmed.
3. The order of Laing J made on 28 June 2017 with regard to the credit card facility is set aside.
4. Judgment entered for the appellant on the claim for the credit card facility in the amount of $394,330.11.
5. 75% costs to the respondents both here and in the court below, to be taxed if not agreed.